CPLR Article 78 Petition - FUSL000031

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

In the Matter of [redacted]
DIN: [redacted],

Petitioner,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, BRIAN FISCHER, Commissioner of New York State Department of Corrections and Community Supervision, NEW YORK BOARD OF PAROLE, ANDREA W. EVANS, Chairwoman of the New York Board of Parole,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

[redacted]

VERIFIED PETITION

Petitioner, [redacted], by and through his undersigned attorneys, HOLLYER BRADY LLP, upon information and belief, respectfully alleges as follows:

1. The Respondents named herein are violating [redacted] law and its Constitution with impunity by conducting unlawful parole hearings that do not comply with statutory amendments that took effect on October 1, 2011.

2. These new laws mandate that Respondents (1) develop and utilize written risk assessment procedures ("Procedures") for making parole determinations and (2) develop a transition accountability plan ("TAP") for each inmate that is to be utilized when making parole determinations.

3. Respondents have admitted that they are statutorily obligated to establish the Procedures and to develop a TAP for each inmate, but they have unquestionably failed to do so.

4. Instead, they hold repeated parole hearings that violate the laws and infringe on inmates' rights. This must stop.

5. On August 21, 2012, Respondents conducted a parole hearing (the "August Hearing") for Petitioner [redacted] without the statutorily-required Procedures and TAP. The next day, Mr. [redacted] received Respondents' denial of his parole application (the "August Decision"). The August Hearing was unlawful, and the August Decision should be vacated.

6. Mr. [redacted] respectfully submits this Verified Petition requesting that the Court enter judgment pursuant to CPLR § 7806: (1) determining that the August Hearing was unlawful; (2) vacating the August Decision; (3) ordering the Board to release Mr. [redacted] or hold a *de novo* hearing in accordance with the law; (4) ordering the Respondents to establish written Procedures in accordance with Executive Law § 259-c(4); (5) ordering Respondents to develop a TAP for Mr [redacted]; and (6) granting such other and further relief as this Court deems appropriate.

PARTIES, JURISDICTION & VENUE

7. Petitioner [redacted], is an inmate currently incarcerated at [redacted]. Mr. [redacted] earned a presumptive right of release when he completed his minimum sentence of incarceration on June 18, 2012. He had no prior criminal record and has no disciplinary infractions in the two years he has been incarcerated.

8. Upon information and belief, Respondent New York State Department of Corrections and Community Supervision ("DOCCS") is an administrative agency of New York State that is in charge of incarcerated persons, with an office located at Building 2, 1220 Washington Avenue, Albany, New York 12226-2050. DOCCS was created in 2011 pursuant to

a statutory merger of the New York Department of Correctional Services and the New York Division of Parole.

9. Upon information and belief, Respondent Brian Fischer is the Commissioner of DOCCS, with an office located at Building 2, 1220 Washington Avenue, Albany, New York 12226-2050. Commissioner Fischer's responsibilities include ensuring that DOCCS complies with statutory requirements, including promulgating the written risk assessment Procedures required by statute.

10. Upon information and belief, the New York State Board of Parole ("Board") is an administrative agency housed within DOCCS that maintains some independent decision-making authority regarding, among other things, parole release. The Board's principal office is located at Building 2, 1220 Washington Avenue, Albany, New York 12226-2050.

11. Upon information and belief Respondent Andrea Evans is the Chairwoman of the Board, with an office located at Building 2, 1220 Washington Avenue, Albany, New York 12226-2050. Respondent Evans's responsibilities include ensuring that the Board complies with statutory directives, including conducting lawful hearings, developing TAP, and making lawful determinations with respect to parole.

12. This Petition challenges (a) Respondents' violation of New York Statutes that direct the promulgation and utilization of written Procedures that incorporate a risk and needs assessment for an inmate, including those with Certificates of Earned Eligibility, such as Mr. [redacted], (b) Respondents' failure to develop a TAP for Mr. [redacted], and (c) Respondents' August Decision to deny Mr. [redacted] parole application.

13. Jurisdiction lies in this Court pursuant to Section 7803(3) of the Civil Practice Law and Rules to determine whether Respondents acted lawfully when they failed to establish

written risk assessment Procedures with respect to an inmate with a Certificate of Earned Eligibility, failed to develop a Transitional Accountability Plan for Mr. [redacted], and failed to grant his parole application.

14. Venue lies in this Court pursuant to C.P.L.R. 506(b) because Columbia County is the County in which Mr. [redacted] was located when the Respondents' held the August Hearing and where Mr. [redacted] received Respondents' decision denying parole.

BACKGROUND FACTS

The Investigation and Plea Agreement

15. In 2007, Mr. [redacted] learned that he was a person of interest in then-Attorney General Andrew Cuomo's investigation regarding New York State's Common Retirement Fund. The investigation was lengthy and high profile, and has been widely reported in the press from 2007 to this day.

16. Mr. [redacted] was indicted in 2009. By that time, he had been under investigation for two years. He had no prior criminal record, committed no crime during the time he was investigated, and continued to live in New York State for nearly two years after his indictment without restriction or incident.

17. In November 2010, Mr. [redacted] pleaded guilty to a single E-Felony in violation of Section 352(c)(6) of the New York General Business Law, the Martin Act, which related to his work as a licensed, registered placement agent. The case involved novel claims of criminal liability under the Martin Act.

18. This was Mr. [redacted] first offense. He was 57 years old.

19. As part of his plea agreement, Mr. [redacted] agreed to life-long penalties that make it impossible for him to even attempt to re-commit the crime to which he pleaded guilty or any other securities-related crime. Thus: Mr. [redacted] lost his securities licenses (both state and

federal), was banned from participating in the securities industry, was banned from acting as a placement agent, was banned from soliciting or receiving public pension fund investments, and was banned from seeking employment and doing business with the State of New York. Mr. [redacted] also became subject to automatic disbarment as an attorney by virtue of his felony conviction. (Exh. A).[1]

20. Due to these extensive banishments, it is **literally impossible** for Mr. [redacted] to commit any securities-related crime again.

21. Mr. [redacted] also agreed to forfeit $19 million (and has done so), which represented all of the fees the Attorney General asserted Mr. [redacted] had earned as a placement agent.

Sentencing

22. On February 14, 2011, the New York City Department of Probation prepared a Pre-Sentence Investigation report. This report recommended probation, a fine, and community service **with no jail time** (Exh. B).

23. Mr. [redacted]s was sentenced on February 17, 2011. At the sentencing, the Attorney General confirmed that Mr. [redacted] had already paid the State Pension Fund almost $18 million with the remainder forthcoming.[2] The Attorney General recommended imposition of a sentence of incarceration, but made no recommendation with respect to the length of incarceration. (Exh. D at 6-7).

24. Mr. [redacted] was given an opportunity to speak prior to sentencing. He expressed his deepest remorse and acknowledged that his actions undermined the integrity of New York State's government. (Exh. D at 15).

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1 Exhibits are annexed to the accompanying Affirmation of Orlee Goldfeld, executed on the 5th day of March 2013, and are referred to herein as "Exh. __."

2 On June 15, 2011, Justice Stone entered an Order confirming that Mr. [redacted] had made full restitution in the amount of $19 million (Exh. C).

25. New York County Supreme Court Justice Lewis Bart Stone sentenced Mr. [redacted] to an indeterminate sentence pursuant to statute of one-and-one-third to four years. Justice Stone found that "it is not likely that [redacted] will 'do it again' in the future."

26. Mr. [redacted] was immediately taken into custody and has been incarcerated since that date.

Model Behavior in Prison

27. During his prison term, Mr. [redacted] has had no disciplinary infractions. On January 12, 2012, Respondents Fischer and DOCCS granted Mr. [redacted] a Certificate of Earned Eligibility, which created a **presumptive right of release** when he completed his minimum sentence on June 18, 2012 ("Minimum Sentence Date"), barring a constitutional and lawful finding by the Board that he was likely to reoffend when at liberty and that his release is not compatible with the general welfare of society. (Exh. E).

28. On February 2, 2012, a parole officer interviewed Mr. [redacted] and administered the COMPAS ReEntry Risk Assessment ("COMPAS") in preparation for Mr. [redacted] s first parole hearing in February 2012. The COMPAS measures an inmate's risk to commit a violent felony, risk to abscond, and risk to be arrested. Mr. [redacted] scored the **lowest possible risk** on all three of the COMPAS metrics. He also scored the **lowest possible overall risk** on the COMPAS. Thus, the Board's **own empirical data** showed that Mr. [redacted] is highly unlikely to reoffend if released, and no more likely to reoffend than any other inmate that applies for parole. (Exh. F).

29. The Board also prepared an Inmate Status Report, which upon information and belief, was based upon the Board's own data and the parole officer's interview with Mr. [redacted]. The Inmate Status Report shows that the Guideline Range of incarceration for Mr. [redacted] was

12-18 months, that he had been granted a Certificate of Earned Eligibility, that he had not incurred any disciplinary infractions to date, that he had a parole release plan that included housing and employment, and that his plan was to return to his work, spend time with his elderly mother, and possibly volunteer or obtain employment with a not-for-profit agency (Exh. G).

30. Respondents never prepared a Transitional Accountability Plan ("TAP"), which is an instrument that, among other things, is required pursuant to Corrections Law § 71-a to provide vital information about an inmate's risks and needs for use at parole hearings (Exh. H).

31. The Board denied Mr. [redacted] parole application in February 2012.

Prior Article 78 Proceedings

32. After perfecting his administrative appeal of the February 2012 parole denial, on May 30, 2012, Mr[redacted] commenced a special proceeding pursuant to Article 78 in the Supreme Court, Albany County, Index No. 3117-2012, with respect to his February 2012 hearing. That Article 78 Petition sought, *inter alia*, judicial review of the Respondents' unlawful conduct in failing to establish the Procedures and a TAP for Mr. [redacted] ("Prior Proceeding") ([redacted] Aff. ¶ 39).

33. On July 5, 2012, after requesting an extension of time to respond to the Mr. [redacted] arguments and to assemble the administrative record, Respondents moved to dismiss the Prior Proceeding for failure to exhaust administrative remedies and that the claims were unripe. Respondents attached a copy of Mr. [redacted] parole packet, but did not address any of the substantive grounds of the Petition. (Exh. I). Mr. [redacted] opposed the Motion.

34. On August 8, 2012, the Court (Cahill, J.) dismissed the Prior Proceeding for failure to exhaust administrative remedies.

35. Prior to that determination, upon the expiration of the four-month administrative appeal period, on July 30, 2012, Mr. [redacted] commenced a second Article 78 proceeding, Index No. 4360-12 (Albany County), on the same grounds as the first Article 78, challenging the Respondents' failure to establish written Procedures, failure to develop a TAP, and irrational, and arbitrary and capricious decision to deny his parole application.[3]

36. When their answer was due, Respondents finally conceded that the February 2012 parole hearing was unlawful for failure to obtain a letter from Mr. [redacted] defense counsel regarding his thoughts on Mr. [redacted] parole application. Respondents offered a *de novo* hearing and requested that the Court dismiss the second Article 78 Petition without ruling on its merits.

August Parole Hearing

37. On August 14, 2012, Mr. [redacted] appeared for his *de novo* hearing. Inexplicably, the Commissioners failed to bring with them Mr. [redacted] parole packet, and claimed that the Board no longer had it because it had been returned to Mr. [redacted] after his February 2012 hearing.[4] Mr. [redacted] arranged for duplicate copies of his parole packet to be provided to the Board.

38. With the parole packet in hand, on August 21, 2012, the Board conducted the *de novo* August Hearing that lasted approximately 30 minutes. (A copy of the redacted transcript is annexed as Exh. L.)

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[3] The Board finally dismissed Mr. [redacted] administrative appeal for academic reasons on February 28, 2013, nearly 1 year after that the appeal was perfected (Exh. S).

[4] Of course, Respondents attached a copy of Mr. [redacted] parole packet to their motion to dismiss Mr. [redacted] first Article 78 proceeding. (Exh. I.)

39. Once again, the Board did not have the written Procedures, and there was no TAP developed for Mr. [redacted].

40. Upon information and belief, prior to the Parole Hearing the Commissioners spent mere minutes reviewing Mr. [redacted]s parole application packet. (Exh. K at 57-59).

41. No evidence adduced during the August Hearing showed any possibility that Mr. [redacted] was a reasonable probability to reoffend if at liberty or that his release is not compatible with the welfare of society.

42. Rather, during the Hearing, the uncontroverted evidence showed that:

- Mr. [redacted] defense counsel strongly supported Mr. [redacted]s parole application (Exh. L at 3)
- This was Mr. [redacted] only conviction (Exh. L at 4).
- Mr. [redacted] has a Certificate of Earned Eligibility, which as a Commissioner stated, "is an important piece of paper. There is a presumption in [Mr. [redacted] favor as it relates to release and it indicates to us that you've been a good prisoner." (Exh. L at 4; Exh. E).
- Mr. [redacted] was "commended" for having "no Tier II or Tier IIIs during his sentence." (Exh. L at 4-5).
- Mr. [redacted], who is in protective custody and thus segregated from the general prison population, has tried to help the inmates around him with their education. (Exh. L at 5).
- Mr. [redacted] has support in the community, including a group of 30 people that signed a pledge to spend one day each month to help him reintegrate into society. (Exh. L at 6, 15; Exh. J).
- Even though Mr. [redacted] has a home to return to and has friends and family ready and willing to take him in, he agreed to live wherever the Board thought was appropriate. (Exh. L at 6-7).
- Mr. [redacted] repeatedly expressed his remorse and stated that he would spend the rest of his life trying to make up for what he had done (Exh. L at 13-14, 28-29).

- Mr. [redacted] has an "overall risk in criminal involvements is rated as being low risk." (Exh. L at 15).
- Mr. [redacted] made full monetary restitution of the $19 million that the prosecutor said that he earned as a placement agent. (Exh. L at 16, 27).
- Mr. [redacted] has an education (Exh. L at 18).
- Mr. [redacted] has several job opportunities available to him upon his release and the financial wherewithal to support himself for the rest of his life. (Exh. L at 19).

43. Notwithstanding the overwhelming evidence in support of release, including the Certificate of Earned Eligibility (Exh. E), COMPAS (Exh. F), and the Inmate Status Report that noted the 12-18 month guideline range (Exh. G), and no opposition to his release, upon information and belief, the Board immediately denied Mr. [redacted] request for parole. The August Decision read as follows:

> Denied 9 months. Next appearance, November 2012.[5]
>
> Parole denied.
>
> After a personal interview, record review, and deliberation, this panel finds your release is incompatible with the public safety and welfare. Required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community reintegration.
>
> Your instant offense involved a guilty plea to General Business Law Section 352-C(6), wherein you engaged in a systematic series of fraudulent stock market-related transactions. Your course of conduct over a period of multiple years show [SIC] a disregard for your ethical responsibilities as a licensed security broker and attorney.
>
> Consideration has been given to your receipt of an Earned Eligibility Certificate, good behavior, program accomplishments (as able), and document submissions.
>
> Due to your actions over a period of time and deceitful nature of those activities which placed the integrity of the New York State

[5] The nine month period was calculated from February 2012.

> Common Retirement Fund at risk, your release at this time is denied. There is a reasonable probability you would not live and remain at liberty without violating the law.

Exh. L at 31-32.

44. Mr. [redacted] was told to reappear in November 2012

November 2012

45. On November 7, 2012, Mr. [redacted] appeared for his next parole hearing. Causing yet additional delay, two of the Commissioners recused themselves, the hearing was cancelled, and Mr. [redacted] was told to come back in December 2012 or earlier.

46. The next day, on November 8, 2012, the Board sent a copy of the August Hearing transcript to Mr. [redacted] counsel, stating that even though his administrative appeal of the August hearing had been perfected, Mr. [redacted] would have an opportunity to provide supplemental briefing based on the transcript on or before December 24, 2012. (Exh. M).

47. On November 14, 2012, the Board conducted a parole hearing and once again denied parole. That decision is not the subject of the instant Article 78 Petition and is currently being administratively appealed.

48. On December 21, 2012, in response to an inquiry from Mr. [redacted] counsel, with respect to the administrative appeal of the August Decision, Counsel to Respondent Board stated:

> By reason of Mr. [redacted] reappearance before the Board of Parole on November 14, 2012, the appeal referenced below, #08-330-12, taken from his August 21, 2012 *de novo* initial interview, is now moot. Matter of Ortiz v. Alexander, 83 A.D.3d 1078; Matter of Borcsok v. New York State Board of Parole, 76 A.D.3d 1167; Matter of Brown v. New York State Board of Parole, 72 A.D.3d 137; Matter of LaSalle v. New York State Division of Parole, 52 A.D.3d 1071; Matter of McAllister v. New York State Division of Parole, 28 A.D.3d 1046, lv. denied, 7 N.Y.3d 715; Matter of Graziano v. Travis, 21 A.D.3d 1174.
>
> Accordingly, there is no need to submit any further documentation in connection with administrative appeal #08-330-12. At this time, the only

> administrative appeal that is pending is the appeal taken from Mr. [redacted] November 14, 2012 reappearance and related decision, administrative appeal #11-270-12.

(Exh. N).

49. It is clear, therefore, that by conducting legally defective parole hearings, Respondents are attempting to block any judicial review of their actions, leading to the unlawful prolonged incarceration of a man who cannot rationally be said to pose any threat to society.

Administrative Appeal Exhausted

50. Mr. [redacted] administrative appeal was perfected on or about September 12, 2012. Respondents had until January 12, 2013 to rule on the appeal. They did not. Accordingly Mr. [redacted] may deem his administrative remedy to have been exhausted, and Respondents may not raise failure to exhaust administrative remedies as a defense herein. 9 N.Y.C.R.R. § 8006.4(c). *See also* N.Y.C.P.L.R. 7801.

ARGUMENT

Point I

Exception to the Mootness Doctrine

51. Respondents will undoubtedly argue that the instant petition should be denied as moot based on Mr. [redacted] subsequent November 2012 parole hearing:

> Where, pending a determination of a proceeding pursuant to CPLR article 78 to review a denial of release to parole, a petitioner receives a subsequent, *de novo* parole hearing, after which the New York State Board of Parole ... denies release, an appeal with respect to the prior denial is rendered academic, since the petitioner is 'being held pursuant to the subsequent determination.'

Matter of Ortiz v. Alexander, 83 A.D.3d 1078, 921 N.Y.S.2d 863 (2d Dep't 2011) (*citing Matter of Flanders v. New York State Div. of Parole*, 14 A.D.3d 703 (2d Dep't 2005)).

52. An exception to the mootness doctrine may apply, however, where the issue to be decided, though moot, (1) is likely to recur, either between the parties or other members of the public; (2) is substantial and novel and (3) will typically evade review in the courts. *See Matter of Hearst Corp. v Clyne*, 50 N.Y.2d 707, 714-15 (1980).

53. In *Matter of Midgette v. New York State Div. of Parole*, 70 A.D.3d 1039, 895 N.Y.S.2d 530 (2d Dep't 2010), the Appellate Division reviewed an earlier parole decision where a "substantial issue" will recur in a later parole hearing, and where another "substantial issue" is likely to recur but evade review." *Id.* at 1040 (*citing Matter of Lebron v. Alexander*, 68 A.D.3d 1476 (3d Dep't 2009); *Matter of McLaurin v. New York State Bd. of Parole*, 27 A.D.3d 565, 566 (2d Dep't 2006); *Matter of Standley v. New York State Div. of Parole*, 40 A.D.3d 1344, 1345 (3d Dep't 2007)).

54. Here, the issue of whether a parole hearing is lawful when it does not comply with the law will undoubtedly recur (and already has at the November 2012 hearing), (2) is substantial and novel, because it may be determinative of whether a man is being lawfully incarcerated, and (3) will evade judicial review based on the Respondents' ability to schedule repeatedly unlawful parole hearings, thereby unilaterally quashing any judicial oversight.

55. Unless this Court intercedes, Mr. [redacted] will once again appear at a parole hearing that will be just as unlawful as the earlier ones for the precise reasons detailed herein. Accordingly, Mr. [redacted] respectfully requests that this Court rule upon the substance of his arguments, rather than simply dismiss the Petition as moot.

Point II

Respondents' Conduct Was Unlawful and Unconstitutional

56. This Petition challenges whether the Board's conduct was lawful at the August Hearing, when it acted in blatant violation of Executive Law § 259-c(4) that requires that the Board to:

> establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision.

57. The purpose of the statutory revisions to the Executive Law, which was enacted on March 31, 2011, was to streamline the parole process and require the Board to make evidence-based determinations for each inmate applying for parole. The focus of parole determinations was to shift away from the instant crime, *i.e.* unchangeable past events, to an inmate's current and future risks and needs, which are changeable.

58. The effective date of this mandate imposed on the Board was October 1, 2011. Mr. [redacted] appeared before the Board on August 21, 2012. More than ten months had passed since the time when the Board was required to establish the written Procedures for its use in making parole decisions that incorporated risk and needs principles to assist in making release decisions. Despite the requirement imposed on the Board by the Legislature in Executive Law § 259-c(4), the Board failed to enact the written Procedures for its use in determining whether Mr. [redacted] may be released at the time of the August Hearing.

59. In fact, a year and a half had passed since the passage of the amendment that provided the Board with notice that the Legislature required it to establish written Procedures for use in making parole decisions. Presumably eighteen months would be sufficient time to

establish the mandated Procedures. Apparently it was not. It is exactly that failure by the Board to enact the required Procedures that makes the August Decision unlawful.

60. Without written procedures, administrative agencies would have unfettered discretion to render unlawful decisions. That is why the Legislature required written procedures to guide the process. The Legislature recognized the danger inherent when an agency exercises discretion in the absence of written procedures. Such unfettered discretion is on its face arbitrary and capricious. "The safeguard against arbitrary administrative action lies in the promulgation of adequate standards ...." *Nicholas v. Kahn*, 47 N.Y.2d 24, 33 (1979). Moreover, "it is fundamental that employees of any State agency must administer the law in accordance with the will of the Legislature." *Id.* at 30. When an agency fails to establish procedures or guidelines, the resulting decision is arbitrary and capricious as a matter of law. *See id.* at 28.

61. "[An] administrative agency is forbidden from exercising its discretionary power without first detailing standards or guides to govern the exercise of that discretion." *Id.* at 34. Not only is a decision made without first enacting Procedures arbitrary and capricious, it is also contrary to law. In this case, the Board has simply chosen to ignore the law, *i.e.* Executive Law § 259-c(4), and make parole decisions without any written Procedures.

Point III

Respondents' Own Statements Prove That No Written Procedures Have Ever Been Established and That The Law Is Being Ignored

62. On October 5, 2011, Respondent Evans issued a memorandum ("Evans Memorandum") in which she stated that the law had been amended and that the Board and DOCCS have been working on developing the TAP:

> [M]embers of the Board have been working with staff of [DOCCS] in the development of a transition accountability plan ("TAP"). This instrument which incorporates risk and needs principles, will provide a meaningful measurement of an inmate's rehabilitation. With respect to the practices of the Board, the TAP instrument will replace the inmate status report that you have utilized in the past when assessing the appropriateness of an inmate's release to parole supervision.

(Exh. O).

63. The Evans Memorandum, written after the effective date of the amendment, further states that if a TAP is not developed, then the commissioners conducting a parole hearing should continue to refer to the Inmate Status Report.

64. The Evans Memorandum does not state that it is the written Procedures required by Executive Law § 259-c(4), and Respondent Evans **admitted one month later that her Memorandum is not the written Procedures** at a hearing before the New York State Assembly's Standing Committee on Correction ("Committee Hearing"):

> As for the Board's development of written procedures to be used when making release decisions, in July of 2011 each member of the Board received training in the use of the TAP instrument. And in September of 2011 all of the members received training in the use of the risk and needs instrument known to all of us as COMPAS. Currently, the use of these instruments is being piloted in three of the department's correctional facilities for the purpose of establishing appropriate conditions of supervision.
>
> When the pilot phase for these instruments is concluded, the Board looks forward to their use when assessing the appropriateness of an inmate's release to community supervision. Because the TAP instrument indicates an inmate's overall effort toward effecting his or her rehabilitation while incarcerated and draws upon information closely associated with their risk of reoffending and in needs in order to become successful, **the Board's written procedures will call for the use and careful consideration of these documents**.
>
> As an interim measure, I instructed the Board to use the TAP instrument when and where it has been prepared for the parole-eligible inmate. Moreover, the Board has been reminded of the standard for assessing the appropriateness of an inmate's release to parole as well as the statutory criteria that must be considered.
>
> And finally, I emphasize that when the Board considers an inmate for parole it must ascertain what steps he or she has taken toward rehabilitation and the likelihood of their success once released into the community.

(emphasis added) (Exh. K at 19-21).

65. Notwithstanding Chairwoman Evans' testimony, DOCCS and the Board never established written Procedures, and the Evans Memorandum, an admittedly interim measure, does not comply with the requirements of Executive Law § 259-c(4), 9 NYCRR 8000.1(b),[6] 9 NYCRR 8000.3,[7] and Art. IV, Sec. 8 of the New York State Constitution.[8]

66. In addition, if the Respondents were to assert that the Evans Memorandum is the written Procedures, then the Respondents would have violated Article 2 of the State Administrative Procedure Act, which governs the Procedures for rulemaking by Respondents DOCCS and Board of Parole (N.Y. SAP Law §§ 102(1), 201-207).

67. Even more perplexing is that Respondent Evans, while acknowledging the statutory amendment requiring her agency's establishment of written Procedures to incorporate risk assessment, directed agency staff in an her Memorandum, that, notwithstanding the amendment, "[p]lease know that the standard for assessing the appropriateness for release, as well as the statutory criteria you must consider has not changed ...." (Exh. O.) The Board's failure to establish the required written Procedures is compounded by Respondent Evans'

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[6] 9 NYCRR 8000.1(b)(1) provides:

(b) Regulations of the Board of Parole shall be enacted by the Board of Parole and shall govern the conduct of the Board of Parole and its responsibility to:

(1) determine what inmates serving indeterminate or reformatory sentences of imprisonment may be released on parole, and when and under what conditions

[7] 9 NYCRR 8000.3 provides:

The chairman in his discretion, or the board in its discretion, may direct orally or in writing that any rule or regulation may be stayed, suspended, rescinded, modified or amended. If the direction is oral, it shall be reduced to writing as soon as practicable, and if the direction constitutes an amendment, it shall be filed with the Secretary of State.

[8] New York State Constitution, Article IV, Section 8 provides, in part:

§ 8. No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state....

disavowal of the statute's import. What, then, was the purpose of the amendment? To keep things *status quo ante*?

68. Such disregard of a Legislative mandate by an administrative agency is arbitrary and capricious and contrary to law.

69. The lack of Procedures is particularly troublesome here in light of the fact that the Board had available for its use the COMPAS Re-Entry Risk Assessment (Exh. F), which determined that Mr. [redacted] was extremely low risk, yet without written Procedures, the Board made a decision outside the requirements of Executive Law § 259-c(4) and irrationally ignored its own risk and needs assessment instrument.

70. Thus, there are no written Procedures, and the August 21, 2012 parole hearing was unlawful, as the Court found in *Matter of Cotto v. Evans*, No. 139796, 2013 NY Slip Op 30222[U] (St. Lawrence Cty. Jan. 22, 2013) (Exh. P):

> [T]his Court finds nothing in the record to suggest that the written procedures mandated by the amended version of Executive Law §259-c(4) were established, much less implemented and considered in the context of determining whether or not petitioner should be released to parole supervision. Accordingly, the Court finds that the December 2011 parole denial determination was not rendered in accordance with law and must be overturned, with the matter remitted to the Board of Parole for *de novo* discretionary parole release consideration. *See Thwaites v. New York State Board of Parole*, 34 Misc 3d 694. *See also Lichtel v. Travis*, 287 AD2d 83.

Point IV

The Board Ignored Relevant Evidence

71. The evidence to be considered by the Board includes a TAP, a Certificate of Earned Eligibility, COMPAS, and the evidence adduced at a parole hearing.

Transitional Accountability Plan

72. In order to make lawful parole determinations, Respondents DOCCS and the Board, under the leadership of Respondents Fischer and Evans, were required to develop for

each inmate a Transitional Accountability Plan ("TAP") in accordance with Correction Law § 71-a, which also became effective on October 1, 2011.

73. The 2011 Annual Report of the New York Assembly's Committee on Corrections described the TAP as:

> ... a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of the TAP is to promote successful rehabilitation and provide DOCCS with the necessary information to prioritize programming and treatment services based on the individual needs of each inmate. The TAP will also be provided to the Parole Board to assist them in making discretionary parole release decisions.

74. According to DOCCS's April 2011 Fact Sheet: "**By statute, DOCCS is required to implement an offender Transition Accountability plan** that includes an integrated team case management plan based on a research based risk assessment tool." (emphasis added) (Exh. Q).

75. When asked about implementation of the TAP at the Committee Hearing in November 2011, Respondent Fischer testified that TAP will "go live by July 1 [2012] and that "three months [thereafter] **everyone will be on it.**" (emphasis added) (Exh. K at 47-48). Respondent Fischer made no statement that only new inmates will have a TAP.

76. Respondent Evans also testified about the TAP at the Committee Hearing. According to her, the legislatively-mandated TAP "will be the instrument that will measure the rehabilitation of persons appearing before the Board as well as their likelihood of success in the community when released." (Exh. K at 19). She further stated:

> Because the TAP instrument indicates an inmate's overall effort toward effecting his or her rehabilitation while incarcerated and draws upon information closely associated with their risk of reoffending and in needs in order to become successful, the Board's written procedures will call for the use and careful consideration of these documents.

(Exh. K at 20).

77. Respondents admit that they did not develop a TAP for Mr. [redacted] (Exh. H). Therefore, Respondents undeniably acted unlawfully by violating Corrections Law §71-a and in contradiction of the testimony given at the Committee Hearing by Respondents Fischer and Evans.

78. By making a parole decision without the use of a TAP, the Board acted contrary to the statutorily mandated lawful procedures, went beyond its prescribed statutory powers, and denied Mr. [redacted] the right to have a decision made based upon risk and needs principles, in violation of lawful procedures and due process of law as guaranteed by the 14th Amendment of the U.S. Constitution and Article I, Section 6 of the New York State Constitution.

Certificate of Earned Eligibility

79. Certificates of Earned Eligibility are granted in accordance with § 805 of the Corrections Law by DOCCS, which is most familiar with an inmate's conduct on a daily and aggregate basis. They are selectively granted by Commissioner Fischer in an exercise of his discretion and only after an inmate satisfies the requirements thereof.

80. In other words, a Certificate of Earned Eligibility is DOCCS's own "stamp of approval" for the Board's release of an inmate at the time he completes his minimum sentence.

81. Mr. [redacted] earned a presumptive right to be paroled because DOCCS gave him a Certificate of Earned Eligibility. N.Y. Corrections Law § 805 provides, in part:

> Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than eight years and who has been issued a certificate of earned eligibility, **shall be granted parole release** at the expiration of his minimum term or as authorized by subdivision four of section eight hundred sixty-seven of this chapter unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society.

82. Thus, section 805 "creates a presumption in favor of parole release of any inmate who ... has received a certificate of earned eligibility and has completed a minimum term of imprisonment of eight years or less." *Wallman v. Travis*, 18 A.D.3d 304, 307 (1st Dep't 2005); *see also Schwartz v. Dennison*, 14 Misc.3d 1211(A), 836 N.Y.S.2d 489 (Table) (Sup. Ct. N.Y. Cty. 2006).

83. Likewise, 9 N.Y.C.R.R. § 8002.3(c) provides that for inmates with a Certificate of Earned Eligibility "parole release **shall be granted** at the expiration of [the] minimum term of imprisonment as long as such release is in accordance with the remaining guideline criteria." Those criteria include the guideline time-range matrix, the institutional disciplinary record, performance during any temporary release programs, release plans, and **any available information** that would indicate an inability to live at liberty without violating the law, and that release is incompatible with the welfare of society. *Id.* (emphasis added).

84. To date, DOCCS has no written Procedures in place as to a risk and needs assessment for any inmate, including those with a Certificate of Earned Eligibility. This amounts to a *per se* violation of Executive Law § 259-c(4).

85. By all measures, Mr. [redacted] should have been granted parole. Review of the guideline criteria shows that in Mr. [redacted] case:

GUIDELINE CRITERIA	MR. [redacted]
Guideline time-range matrix: 12-18 months	More than 24 months thus far.
Performance during any temporary release programs	N/A. No temporary release granted although applied for.
Release plans	A home, employment, family support, community support, and financial self-sufficiency
Information indicating an inability to live at liberty without violating the law	None
Information that release is incompatible with welfare of society.	None, including no opposition to parole

COMPAS

86. The lack of Procedures is particularly troublesome in light of the fact that the Board had available for its use the COMPAS, which determined that Mr. [redacted] was extremely low risk (actually the lowest possible risk on the scale) (Exh. E). Yet, without Procedures complying with due process, the Board made a decision outside the requirements of Executive Law § 259-c(4) and irrationally ignored its own risk and needs assessment instrument. The development and implementation of this instrument was also mandated by the recent amendment to Correction Law § 112(4).

87. With a risk and needs assessment instrument before them that Respondents were required to develop and implement, and without any of the lawfully required written Procedures as to how to use such instrument in order to make their release decision, the Board acted in violation of lawful procedures and due process of law as guaranteed by the 14th Amendment of the U.S. Constitution and Article I, Section 6 of the New York State Constitution.

Due Process

88. Moreover, the Board, under Respondent Evans' direction, conducted the unlawful August Hearing that deprived Mr. [redacted] of due process. Due process requires that the Board provide an inmate with an opportunity to be heard and a substantive explanation of the reasons for denial of parole. *See Schwartz v. Dennison*, 518 F. Supp. 2d at 573. Due process also requires that the August Hearing be conducted pursuant to the New York Statutory edicts that the Board follow written risk assessment Procedures and develop a TAP of each inmate.

89. Accordingly, the Parole Hearing was unlawful and unconstitutional on its face.

90. Due process also requires that the reasons for denial cannot be conclusory, arbitrary, impermissible, or a mere regurgitation of the statutory language. *Id.* at 574.

91. Executive Law § 259-i(2)(a) provides in relevant part:

> If parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the *factors and reasons* for such denial of parole. *Such reasons shall be given in detail and not in conclusory terms*. (Emphasis added).

The rules and regulations governing parole include similar provisions:

> Decisions outside the guidelines. The time ranges indicated above are merely guidelines. Mitigating or *aggravating factors* may result in decisions above or below the guidelines. In any case where the decision rendered is outside the guidelines, the *detailed reason for such decisions, including the fact or factors* relied on, shall be provided to the inmate in writing.

9 NYCRR §8001.3(c) (emphasis added).

92. The August Decision failed to provide the requisite detail and/or non-conclusory terms the statute and regulations demand, and no aggravating factors were identified. The Board's determination was made in violation of the due process clauses of the 14th Amendment of the U.S. Constitution and Article I, Section 6 of the New York State Constitution.

93. The Board also denied Mr. [redacted] the opportunity to be heard. Executive Law § 259-i(2)(c)(A) requires the Board to consider certain factors enumerated in the statute (i) through (vii). The factors to be considered include the Mr. [redacted] institutional disciplinary record, involvement in institutional programs, and plans upon release, in addition to the circumstances surrounding the criminal offense for which he currently is incarcerated.

94. The Board did not inquire into Mr. [redacted] positive interactions with prison staff during his incarceration, including his counselors, corrections officers, and various departmental supervisors, none of whom ever cited Mr. [redacted] with a disciplinary infraction.

95. Moreover, the statutory language compels a distinction in the review of parole denial determinations affecting inmates, such as the Mr. [redacted], who have been issued

Certificates of Earned Eligibility. *See Oberoi v. Dennison*, 19 Misc. 3d 1106(A) (Franklin County 2008).

96. Mr. [redacted] receipt of a Certificate of Earned Eligibility creates a liberty interest that entitles him to due process protections in the consideration of his parole application:

> [A]n inmate with a protected liberty interest created by the parole statue such as N.Y. Corrections Law §805 is entitled to 'an opportunity to be heard, and when parole is denied [the Parole Board] **informs the inmate in what respects he falls short** of qualifying for parole.

Schwartz v. Dennison, 518 F. Supp. 2d 560, 572 (S.D.N.Y. 2007) (quoting *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 16, 99 S. Ct. 2100 (1979)) (emphasis added).

97. The August Decision does not inform Mr. [redacted] as to how he fell short of qualifying for parole. As the Transcript indicates, the August Decision was based solely upon the instant crime and made no mention of what would have been required for him to qualify for parole. Exh. L at 31-32.

Point V

Respondents' Decision Was Irrational, Bordering on Impropriety

98. New York Courts routinely find irrationality where the Board denies parole without evidence or in a conclusory fashion. *See, e.g., Coaxum v. New York State Board of Parole*, 14 Misc. 3d 661 (Sup. Ct. Bronx Cty. 2006); *Weinstein v. Dennison*, 7 Misc. 3d 1009 (Sup. Ct. N.Y. Cty. 2005).

99. Mr. [redacted] earned a presumptive right to be released on his Minimum Sentence Date of June 18, 2012, based upon his receipt of a Certificate of Earned Eligibility. Rebuttal of that presumption must have been made legally.

100. Discretionary parole release determinations are statutorily deemed to be judicial functions which are not reviewable if done in accordance with law, *see* Executive Law § 259-i(5), absent a showing of irrationality bordering on impropriety. *See, e.g., Russo v. New York State Parole*, 50 N.Y.2d 69, 77, 427 N.Y.S.2d 982 (1980); *Matter of Marino v. Travis*, 13 A.D.3d 453, 787 N.Y.S.2d 54 (2d Dep't 2004) (holding that denial of inmate's release was irrational when not based upon any relevant evidence).

101. Here, the Board abused its discretion in denying parole. **Nothing** in the evidentiary record supports the Board's conclusion that there is a reasonable probability that Mr. [redacted] would not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society:

a. The Board's own COMPAS assessment rated Mr. [redacted] at **the lowest possible risk** to reoffend, abscond, or be arrested.

b. DOCCS awarded Mr. [redacted] a Certificate of Earned Eligibility, which grants a **presumptive right of release.**

c. The Inmate Status Report, which was conducted by a parole officer, showed that Mr. [redacted] has been a model inmate with **no disciplinary infractions** and that the **maximum sentence range** according to regulatory guidelines for his first time offense of an E felony **was 12-18 months,** 9 NYCRR § 8001.3.

d. The sentencing judge was of the opinion that Mr. [redacted] **"wouldn't do it again."** In addition, the sentencing judge did not oppose parole.

e. The Probation Department recommended **no jail time.**

f. The Office of the Attorney General **did not recommend any length of incarceration.**

g. The Office of the Attorney General **did not oppose parole.**

h. Mr. [redacted] **is a first-time offender** of a **non-violent crime.**

i. Mr. [redacted] made **full monetary restitution of $19 million** – the total amount sought by the Office of the Attorney General.

j. Mr. [redacted] parole plan included **employment, a residence, family** and **community support**, and **financial self-sufficiency**.

102. Facially and substantively, there was nothing more that Mr. [redacted] could have done as an inmate or provided to the Board in his submissions in order to qualify for parole.

103. If someone with Mr. [redacted] outstanding record cannot receive parole, can anybody?

104. The statutory guidelines require consideration of the factors enumerated in Executive Law § 259-i(a)(2)(C). After considering all the factors relevant to the individual inmate, the Board then may accord greater or lesser weight or emphasis to different factors. The decision-making is a process of determining which factors outweigh others: a balancing process. Here, however, the Board's decision reveals it accorded *no* weight and *no* emphasis whatsoever to *any* factor apart from Mr. [redacted] offense. When left with the offense as the exclusive factor considered and sole basis for the Board's conclusion of nonrehabilitation and unreadiness for release, the conclusion is irrational and contrary to the statutory discretion authorized. *See Wallman v. Travis,* 18 A.D.3d at 307-08, 794 N.Y.S.2d 381; *Coaxum v. New York State Board of Parole*, 14 Misc. 3d 661 (Sup. Ct. Bronx Cty. 2006); *Weinstein v. Dennison*, 7 Misc.3d 1009.

105. Moreover, Executive Law § 259–i(2)(a) requires the Board, upon a denial of parole, to issue a written determination of the factors and reasons for such denial "**in detail and in non-conclusory terms**" (emphasis added).

106. The August Decision includes no meaningful elaboration as to the stated reason for denial, only a perfunctory recitation of the factors purportedly considered. Paying lip service to the statutory factors without providing any substance is insufficient. *See, e.g., In re Winchell,* 32 Misc. 3d 1217(A), at *5 (Sullivan County 2011) ("The Board cannot deny parole merely

repeating the statutory criteria."); *Weinstein v. Dennison* ("[T]he Board is required to do more than merely mouth the statutory criteria, particularly where as here each factor recited and brought forth in the parole interview, other than the crime itself, militated in favor of release").

107. Thus, where, as here, the Board focuses entirely or even "almost entirely on the nature of petitioner's crime, there is a strong indication that the denial of parole is a foregone conclusion and does not comport with the statutory scheme." *King v. New York State Division of Parole*, 190 A.D.2d 423, 431–32, 598 N.Y.S.2d 245 (1st Dep't 1993); *see also Kozlowski v. New York State Board of Parole*, 2013 NY Slip Op 30265[U] (Sup. Ct. Feb. 05, 2013) (Exh. R).

108. In the absence of judicial intervention now, Mr. [redacted] is in a Kafkaesque constitutional Catch-22 – stuck in an administrative proceeding designed to keep him incarcerated without a way out. The Board conducted a facially and substantively unlawful Parole Hearing in violation of Mr. [redacted] due process rights and the laws of New York. As a result, he remains incarcerated past his Minimum Sentence Date, and longer than the Certificate of Earned Eligibility, COMPAS, and the evidence adduced at the August Hearing would require.

Point VI

Unlawful Re-Sentencing

109. The New York State sentencing and parole scheme is well-established. The Legislature and the Governor set the sentencing law and ranges, and Justices implement the sentencing ranges. The Legislature and Governor set the parole standards, including Corrections Law § 805 Certificate of Earned Eligibility and the benefits that run with it, and the Board's job is to implement those standards – not to undermine them or usurp them.

110. While the Board has wide discretion within the statutory framework for parole decisions, the Board does not have the authority to resentence. The Board's role is to evaluate an inmate's **current danger**, not to resentence him for a past crime. *See, e.g., Winchell v. Evans*, 32 Misc. 3d 1217(A), at *2 (Sup. Ct. Sullivan Cty. July 19, 2011) ("Parole may not be denied solely based on the offense itself.... Re-sentencing is not the purview of the Parole Board."); *Johnson v. NY State Division of Parole*, 65 A.D.3d 838, 65 A.D.3d 838 (4th Dep't 2009); *Patterson v. Cully*, Index No. I-2011-4748 (Sup. Ct. Erie Cty. Feb. 29, 2011); *Wallman v. Travis*, 18 A.D.3d 304, 307-08 (1st Dep't 2005); *Weinstein v. Dennison*, 7 Misc. 3d 1009.

111. As Respondent Evans stated herself, the mission of the Board is to "**ensure public safety** by granting parole when appropriate under the governing standards." Here, there is no evidence that Mr. [redacted] poses a threat to public safety. Rather, Respondents are usurping the judicial function by resentencing Mr. [redacted] to a lengthier period of incarceration.

112. In reality, by ordering Mr. [redacted] next parole hearing in November 2012, the Board re-sentenced Mr. [redacted] by declaring that he should nearly 2 years for his crime. This re-sentencing exceeds the statutory sentence in place for a Martin Act violation, the sentence imposed by the Justice Stone, and even the regulatory guidelines that provide that Mr. [redacted] should be held for 12-18 months, 9 NYCRR § 8001.3 (Exh. G).

113. The Board's decision reflects that it (a) determined the minimum sentence that Justice Stone imposed to be of no consequence and (b) viewed a one-and-one-third to four year sentence to be the same as a two and three-quarters to four years sentence or simply a four year sentence. The one-and-one-third sentence imposed, however, reflects the *Court's* determination that under circumstances of reform and rehabilitation, consistent with the statutory scheme, one-and-one-third is sufficient. Ignoring the sentence that the Court imposed, the Board effectively

undertook an unauthorized resentencing, substituting its own opinion of the appropriate sentence for that of the Court and the Legislature. *See Wallman v. Travis*, 18 A.D.3d 304, 307, 311 (1st Dep't 2005); *Silmon v. Travis*, 95 N.Y.2d 470, 476, 718 N.Y.S.2d 704 (2000); *Weinstein v. Dennison*, 7 Misc. 3d 1009.

114. Moreover, the Board has intentionally turned a blind eye to the statutory directive that an inmate with a Certificate of Earned Eligibility be granted parole at the conclusion of his minimum sentence.

115. In its August Decision, the Board only discussed Mr. [redacted] underlying crime. It provided no substantive basis for its finding that Mr. [redacted] is a reasonable probability to reoffend if at liberty and that his release is not compatible with the welfare of society. In the *Matter of King v. N.Y.S. Division of Parole*, 190 A.D.2d 423, 432, 598 N.Y.S.2d 245 (1st Dep't 1993), *aff'd*, 83 N.Y.S. 788 (1994), the Court held that the Board's exclusive reliance on the severity of the offense to deny parole not only contravenes the discretionary scheme mandated by statute, but also effectively constitutes an unauthorized re-sentencing. That is precisely what occurred here. *See Kozlowski v. NY Board of Parole* (Exh. R).

CONCLUSION

116. Based on the foregoing, it is apparent that the Respondents' actions are unconstitutional, unlawful, irrational, arbitrary and capricious. Their acts have led to an unconstitutionally prolonged incarceration of Mr. [redacted] since June 18, 2012.

117. Respondents have failed to discharge their statutory duties to develop written risk assessment Procedures regarding an inmate with a Certificate of Earned Eligibility, failed to develop a TAP for Mr. [redacted], failed to conduct a lawful parole hearing, and failed to make a rational determination about granting Mr. [redacted] parole application.

118. Only this Court can stop Respondents' continued illegal and unconstitutional actions. Mr. [redacted] has already been punished by the laws of New York State for the crime he committed, and he has paid the price. Now Mr. [redacted] and the criminal justice system need to be protected from those who would undermine it. Justice demands no less.

119. As set forth above, no previous application has been filed for the relief sought herein with respect to the August 2012 parole hearing. The two prior Article 78 proceedings (Index Nos. 3117-12 and 4360-12) related to the February 2012 parole hearing and were dismissed as moot based on Respondents' holding of the August Hearing.

WHEREFORE, Mr. [redacted] respectfully requests that this Court enter Judgment pursuant to Article 78 of the Civil Practice Law and Rules:

A. Finding that the August Decision denying parole was made unlawfully;

B. Vacating the August Decision;

C. Directing Respondents to establish written risk assessment Procedures for parole determination relating to inmates with a Certificate of Earned Eligibility and to use them with respect to Mr. [redacted] request for parole;

D. Directing Respondents to prepare a Transitional Accountability Plan for Mr. [redacted]

E. Directing Respondents to release Mr. [redacted] or to hold a *de novo* hearing before a new panel of Commissioners in accordance with the laws and regulations of the State of New York; and

F. Granting such other and further relief as is just and proper.

Dated: New York, New York
March 5, 2013

Respectfully Submitted,

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[redacted]

Rule 130-1.1 Certification:
To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of these papers of the contentions therein are not frivolous as defined in subsection (c) of section 130-1.1 of the Rules of the Chief Administrator (22NYCRR).

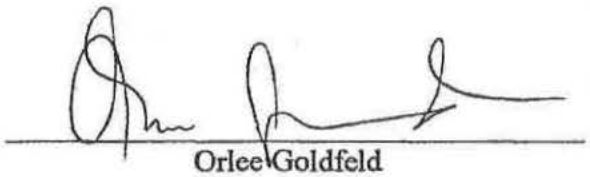
Orlee Goldfeld

ATTORNEY VERIFICATION

Orlee Goldfeld, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

I am Of Counsel to the firm of Hollyer Brady LLP, counsel for Petitioner [redacted] I have read the foregoing Petition and know the contents thereof, and the same are true to my knowledge, except those matters therein which are stated to be alleged upon information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon facts, records, and other pertinent information contained in my files.

I make the foregoing affirmation pursuant to CPLR 3020(d)(3) because Petitioner is not in the County where I have my office.



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